Supreme Court, U. S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA ex rel. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION,

Respondents.

76-1602

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

THE PEOPLE OF THE STATE OF CALIFORNIA ex rel. DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA ex rel. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 16, 1977.

OPINIONS BELOW

The unreported memorandum opinion of the United States District Court for the Eastern District of California is included herein and appears in Appendix A. The unreported per curiam opinion of the United States Court of Appeals for the Ninth Circuit is included as Appendix B. Pursuant to a petition for rehearing by the State of California, this opinion was superseded by the Ninth Circuit Court of Appeals in its opinion of February 16, 1977. The Superseding Opinion is reported at 547 F.2d 1388 and is reprinted in Appendix C.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on February 16, 1977 by virtue of its Superseding Opinion issued on that date. Neither party has requested a rehearing following the issuance of this Superseding

Opinion. This Petition for Writ of Certiorari is being filed within ninety (90) days of the date of entry of Judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QULSTIONS PRESENTED

1. Whether the determination of what constitutes reimbursable "costs of construction" as such phrase is set forth in 23 U.S.C. Section 101(a) is to be governed by the law of California or federal policy.

2. Whether the Secretary of the Department of Transportation, acting by and through the Federal Highway Administration, has the power to make an independent review of the reasonableness of the costs of construction incurred by a state.

THE STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

1. Sections 101(a), 106(a), 108(a), 120(c) and 315 of Title 23 of the United

States Code (parts of the Federal-Aid Highway Act) are set forth in Appendix D.

2. Section 1255b, paragraphs (a), (b) and (c) of the California Code of Civil Procedure are set forth in Appendix E.

3. Paragraphs 80-1 3a(2), 5i, 5j, 5n and 80-4 3i of the Policy and Procedure Memoranda of the Federal Highway Administration are set forth in Appendix F.

STATEMENT OF THE CASE

The underlying action was brought by the State of California, acting by and through its Department of Transportation, hereafter referred to as "California," to recover money and for declaratory relief based upon the contractual obligation of the United States imposed by 23 U.S.C. Section 106(a) to reimburse California for interest paid to a condemnee by California on a security deposit in a

California Superior Court condemnation action. The District Court's jurisdiction was invoked under 28 U.S.C. Section 1346(a)(2). The District Court granted summary judgment in favor of the United States on September 4, 1974 on the basis of PPM 80-4 3i.

This matter is not frivolous by reason of the small amount of money claimed by California in the District Court. At stake is roughly $1.5 million of federal money for California which should participate in the reimbursement of construction costs for Federal-Aid Highway projects in California. In addition, this case presents an important question of law concerning the manner in which the reimbursable costs of construction should be determined. Such question may affect all of the 50 states.

In connection with the construction of Interstate 5 in San Diego County, California acquired a parcel of land through condemnation. Prior to paying just compensation to the landowner, California obtained an order for immediate possession of the property so that construction would not be delayed pending a trial on the issue of just compensation. Under California law, to obtain an order for immediate possession, California must deposit with its treasurer an amount equal to the estimated market value of the property. The landowner is then permitted by California law to obtain this money immediately or leave it with the State Treasurer until the trial is completed. See California Code of Civil Procedure Section 1255b(a) and (c). While the money is on deposit in the treasurer's office, it draws interest at the rate of 7 percent per year.

In the instant case, the money remained with the State Treasurer for 414 days from March 1, 1967 to April 17, 1968. The deposit was $2,100 resulting in interest in the amount of $166.73. The United States reimbursed California $12.08 which amount represented 90 percent of interest for 30 days only. The United States refused to participate in any interest costs for the remaining 384 days based upon FHWA PPM 80-4 31.

REASONS FOR GRANTING WRIT

I

INTRODUCTION

Petitioner submits that the Court of Appeals has decided an important question of California law in a way which conflicts with the applicable law of California. As California will set forth in detail herein, the United States incorporated the law of the states regarding reimbursable costs of construction into federal

law but the Court of Appeals has decided the issue according to a federal policy which not only conflicts with the law of California but is void. This raises important questions for all the states concerning the manner in which the costs of construction of a Federal-Aid Highway project should be reimbursed by the United States to the states. California submits that the costs of construction for which a state is reimbursed are those costs incurred pursuant to and in conformity with the applicable State law. The Court of Appeals not only disregards California law but confers upon the Secretary of Transportation the power to review all of the State's costs of construction to determine their "reasonableness". Clearly, the opinion of the Court of Appeals will allow the Secretary to pass upon the "reasonableness" of a jury verdict in a state court which has determined the just

compensation to be paid to a condemnee. This is a power which Congress did not confer and the Secretary has not assumed by policy or regulation. It is a power conferred by the Court of Appeals upon the Secretary which has potentially disastrous results for the states.

II

ARGUMENT

A. THE LAW OF CALIFORNIA GOVERNS WHAT COSTS OF CONSTRUCTION ARE REIMBURSABLE, BECAUSE CALIFORNIA LAW ON THE SUBJECT IS INCORPORATED INTO FEDERAL LAW AND PPM 80-4 31, WHICH CONFLICTS WITH CALIFORNIA LAW, IS VOID

The Court of Appeals was bound to apply California Code of Civil Procedure Section 1255b and reimburse California 90 percent of the total interest paid on the security deposit. California, by Code of Civil Procedure Section 1255b, permits interest to accumulate on a

security deposit until just compensation is finally determined in an eminent domain proceeding in a California state court.[1/] This accumulated interest is reimbursable according to PPM 80-1 3a(2) which obligates the United States to participate in right-of-way costs of the state that are incurred "pursuant to and in conformity with state law."[2/]

1/ Under federal law, interest ceases upon the deposit of probable just compensation into court. 40 U.S.C. § 258(a).

2/ This obligation is not significantly changed by 23 CFR 710.303(b) and 710.304 (July 19, 1974). Obviously, the State must comply with procedural directives of FHWA to claim reimbursement. However, the substantive law regarding reimbursable construction costs is still determined by State law. Also, new California Code of Civil Procedure §§ 1268.310-1268.340, effective July 1, 1976, permit the landowners to accumulate interest as under the old law. However, 23 CFR § 710.304(j)(3) now excludes all interest on security deposits where the owner chooses not to withdraw it.

State laws regulating the planning and building of highways are not set aside by the Federal-Aid Highway acts. D. C. Federation of Civic Associations, Inc. v. Airis, 391 F.2d 478, 483 (D.C. Cir. 1968).[3/] The promulgation of PPM 80-1 3a(2) which obligates the United States to participate in right-of-way costs incurred pursuant to State law demonstrates that the United States intends that the law of California not be preempted as a condition of reimbursement. Wheeler v. Barrera (1974) 417 U.S. 402, 417, 418. By reason of PPM 80-1 3a(2), the United States adopted Code of Civil Procedure Section 1255b as federal law. Brazier v. Cherry, 293 F.2d 401, 405 (5th Cir. 1961); see also: 1956 U.S. Cong. & Admin. News,

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3/ Appalachian Mountain Club v. Brinegar (1975) 394 F.Supp. 105, 111, seems contrary to this point.

p. 2825. And, according to well-established principles of contract law, the United States, by PPM 80-1 3a(2), agreed to refer to the law of California to determine the reimbursable costs of construction. Seeman v. Philadelphia Warehouse Co. (1927) 274 U.S. 403, 407; Lauritzen v. Larsen (1953) 345 U.S. 571, 588, 589. Moreover, PPM 80-1 3a(2) having been promulgated on March 20, 1969, controls over PPM 80-4 31 which was promulgated in 1967. Inter-Continental Promotions, Inc. v. MacDonald, 367 F.2d 293 (5th Cir. 1966), cert. denied 393 U.S. 834.

B. PPM 80-4 31 IS VOID

The Superseding Opinion of the Ninth Circuit concludes:

> "Having found that the PPM at issue in the present case is consistent with the purposes and policies of the Federal-

> Aid Highway Act, we defer to the interpretation adopted by the Department."

As shown above, the Court of Appeals was bound to defer to California Code of Civil Procedure Section 1255b. Moreover, the Court of Appeals compounded its error by finding that PPM 80-4 31 is consistent with the purposes and policies of the Federal-Aid Highway Act.

While it is true that judicial deference is given to administrative regulations or interpretations of an act of the Legislature, as stated in Griggs v. Duke Power Company (1971) 401 U.S. 424, and Espinosa v. Farrah Manufacturing Company, Inc. (1973) 414 U.S. 86, such regulations or interpretations are not legally binding upon the court and are entitled to little or no deference when they do not comport with congressional intent. Dobbs v. Train

(1975) 409 F.Supp. 432, 436.

The law is clear that an administrative regulation, which is contradictory of the plain meaning of an unambiguous statute, is an attempt at legislation and has no legal effect. Helvering v. Sabine Transp. Co. (1943) 318 U.S. 306, 311, 312; Helvering v. Credit Alliance Corporation (1942) 316 U.S. 107, 113. The law of the Ninth Circuit is in conformity with this principle. As stated in General Services Administration v. Benson, 415 F.2d 878, 880 (9th Cir. 1969), an administrative regulation will be given the force and effect of law provided it is reasonably adapted to the administration of a congressional act, and is not inconsistent with any statute.

Also, an administrative interpretation[4/] or policy must be consistent with the legislation that it interprets. Social Security Board v. Nierotko (1946) 327 U.S. 358, 369. Such interpretations or policy have less impact upon the courts than regulations. American President Lines Ltd. v. Federal Maritime Com'n, 316 F.2d 419, 422 (D.C. Cir. 1963); O'Neill v. United States (1968) 281 F.Supp. 359, aff'd. 410 F.2d 888.

4/ PPM 80-4 31 is an interpretation rather than a regulation. Lathan v. Brinegar, 506 F.2d 677, 682, fn. 6 (9th Cir. 1974). Petitioner emphasized this point in its petition for rehearing because that petition sought to reverse the summary judgment entered in favor of the United States in the trial court. For the purposes of this petition, California submits that the distinction is immaterial, since PPM 80-4 31, whether a regulation or interpretative ruling, is outside the authority of the Secretary of Transportation.

PPM 80-4 31 is not consistent with 23 U.S.C. Section 120(c). The term "total" in 23 U.S.C. Section 120(c) has a plain meaning. It means "whole, entire." Webster's Third Int. Dictionary, p. 2414. It means "not divided, lacking in no part, full, complete, the whole amount." Black's Law Dictionary, 4th Edition, p. 1661. See also: Piedmont Publishing Co. v. Rogers (1961) 193 Cal.App.2d 171, 188. Words used in a statute without limiting definition and without a legislative history indicating a contrary definition should be given their common and ordinary meaning. C. I. R. v. Brown (1965) 380 U.S. 563, 570, 571; Malat v. Riddell (1966) 383 U.S. 569, 571; Dobbs v. Train, supra, at 436. The legislative history of Title 23 does not indicate that the word "total" should mean other than "the

whole amount," and in fact the history supports this meaning.

One aim of Congress in revising, codifying and enacting into law Title 23 of the United States Code was to bring clarity and conciseness into the laws applicable to the Federal-Aid Highway program. 1958 U.S. Cong. & Admin. News, p. 3944. A further goal of Congress in enacting the Federal-Aid Highway Act was that the United States pay 90 percent of the cost of the interstate highway system. 1959 U.S. Cong. & Admin. News, p. 2734. In 1968, the United States expanded its participation in advance acquisition of rights-of-way costs to include the entire costs of property management expenses as well as related moving and relocation expenses. 1968 U.S. Cong. & Admin. News, p. 3506; 23 U.S.C. Section 108(2); 1966 U.S. Cong. & Admin. News, p. 2834.

The history of the present Federal-Aid Highway Act begins in 1916. The congressional purpose of the present act is clear: to provide a clear and concise law to administer; to provide 90 percent of all necessary funds to the states for construction of interstate highways; and to expand federal participation for various items of cost involved in the acquisition of rights-of-way. Therefore, if there is any doubt as to the meaning of "total" as it relates to this issue, the doubt should be resolved in favor of its plain meaning: the whole amount.

California also points out that in 23 U.S.C. Section 101(a) the term "construction" includes "... all expenses incidental to construction ..." (emphasis added).

Thus, from a reading of Title 23 as a whole, from information found in the

congressional news reports, and from the plain language of Title 23, the intent of Congress is established that the United States participate in the total interest costs in question.

PPM 80-4 31 is therefore outside the authority of the Secretary's powers to make regulations or interpretive rules. To paraphrase the court in Tullock v. State Highway Commission of Missouri, 507 F.2d 712, 716 (8th Cir. 1974), the federal policy in question, PPM 80-4 31, goes beyond the specific language of 23 U.S.C. Section 120(c) and must be struck down.

C. THE SECRETARY OF TRANSPORTATION HAS NO POWER TO REVIEW THE REASONABLENESS OF COSTS OF CONSTRUCTION

The Circuit Court noted in its opinion that the State's position that "total cost" as used in 23 U.S.C. Section

120(c) has a plain meaning and that interest on the purchase price of an acquired right-of-way is part of the total cost thereof, "would prevent the Secretary (now the Secretary of Transportation) from making any evaluation as to the reasonableness of the costs of construction or from promulgating regulations reasonably designed to limit such costs." (Emphasis added.) Allowing the Secretary to second-guess the reasonableness of costs of construction has the potential for disaster for the various states. Except in certain specified instances,[5/] the Secretary has assumed no power to evaluate the reasonableness of the costs of construction. In other words, once a cost is identified

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5/ PPM 80-1 5i, PPM 80-1 5j and PPM 80-1 5n set forth in Exhibit F.

as a cost of construction as set out in 23 U.S.C. Section 101(a) and incurred pursuant to State law, its amount is not further reviewable by the Secretary to determine its reasonableness. For example, if the jury in a state condemnation action awards a property owner a high verdict as just compensation for the property acquired, the Secretary cannot pass a second judgment on whether such a verdict is or is not a reasonable price to pay for the land. In only two instances may the Secretary pass on the "reasonableness" of a cost of construction: First, expenses normal to the operation of the State highway department and incident to the acquisition of rights-of-way, such as escrow services (PPM 80-1 5i), and, second, the cost of acquisition of property to replace other public property that has been acquired for highway purposes (PPM 80-1 5n). Otherwise,

without qualification as to reasonableness, the costs of construction which are reimbursable to the states are the costs that are incurred pursuant to and in conformity with State law (PPM 80-1 3a(2)). The Circuit Court therefore recognizes in the Secretary more power than in fact or law he wants or possesses.

Administrative agencies should be bound by their own rules and regulations. Safety-Kleen Corp. v. Dresser Industries, Inc. (C.C.P.A. 1975) 518 F.2d 1399, 1403. The authority to change an administrative regulation and policy does not relieve the agency from the obligation to follow such regulations and policies until they are officially and publically changed (court's emphasis). Oil Shale Corporation v. Morton (1973) 370 F.Supp. 108, 123-124. It is basically improper and

contrary to due process to add an unpublished implied condition or exception to a regulation. Johnson v. Udall (1968) 292 F.Supp. 738, 750.

The Court of Appeals has added the unpublished implied condition of "reasonableness" to those costs of construction incurred pursuant to and in conformity with state law. This will jeopardize, for example, competitive bidding for construction contracts in California. The costs of a construction contract are the result in large measure of competitive bids. Based on the opinion of the Court of Appeals, California may not be prudent in accepting the lowest responsible bid, but rather that bid which may be considered to be reasonable in the eyes of the Federal Highway Administration. Unfairness and confusion lurk in the lament of the Court of Appeals that the

Secretary will be prevented from reviewing the costs of construction for their reasonableness if California's position is sustained.

Such a power will also lead to illusory contracts between the states and United States because the states will never be able to obligate the United States to a specific reimbursable cost of construction. Costs of a highway project incurred pursuant to state law are known to, or readily identified by, the states. Whether such costs are reasonable in the eyes of the United States is speculative.

California is not contending that the Secretary be deprived of any discretion he may rightly exercise consistent with the language of the statute. For example, the Secretary may properly limit the reimbursable administrative expenses of State highway departments to

encourage efficiency in government. (PPM 80-1 51.) Contrary to the intimation of the Court of Appeals, a declaration that PPM 80-4 31 is invalid will not leave the federal treasury at the "mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly," for State law requires that interest be paid until withdrawn by the landowner. California Code of Civil Procedure Section 1255b.

The other rationale stated by the Court of Appeals in support of its conclusion is totally without logical foundation. The Court concludes that PPM 80-4 31 is valid because it is consistent with the language of 23 U.S.C. Section 108(a) which states the legislative intent that for the purpose of facilitating the acquisition of rights-of-way in the most

expeditious and economical manner, the Secretary may make funds available under such rules and regulations as he may prescribe. The reference to 23 U.S.C. Section 108(a) by the Court of Appeals is misplaced for two reasons: First, Section 108(a) encourages the long-range planning goals of state highway departments rather than the limiting of particular items of cost of an individual project. See 1966 U.S. Cong. & Admin. News, p. 2832. Second, the refusal of the United States to reimburse the State for interest expenses on deposited funds could not possibly, as the Court suggests, encourage landowners to withdraw the deposited funds as soon as they were available because state law specifically permits them to do otherwise. If the Court is implying that the reimbursement restrictions will encourage the state to

change its law, it is misstating the long held constitutional principle that states cannot be prevented from enforcing their laws unless the intent of Congress to do so is definitely expressed. H. P. Welch Co. v. State of New Hampshire (1939) 306 U.S. 79, 85; Illinois Cent. R. Co. v. Public Utilities Commission (1918) 245 U.S. 493. Congress has nowhere expressed its intent to limit the amount of interest states may pay to landowners on deposits of probable compensation in eminent domain actions, nor may it constitutionally do so.

CONCLUSION

California has already witnessed the impact of this case. In a recent case between California and the United States on a related issue before the United States Court of Claims, No. 281-75, decided March 23, 1977, the court noted in referring to this case:

"... Furthermore, in a very recent case, the United States Court of Appeals for the Ninth Circuit upheld the principle that the terms of the Federal Highway Administration's Policy and Procedure Memorandum govern the amount payable to the state concerning highway programs under the Act ..."

As California has demonstrated herein, where costs of construction are concerned, such costs are determined by reference to the applicable State law. Moreover, when such costs are within the intent of Congress, the Secretary has no power to exclude them. For these reasons,

California prays that the Writ of Certiorari be granted and the decision of the Court of Appeals be reversed.

DATED: May 12, 1977.

Respectfully Submitted,

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APPENDIX A

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

-oOo-

PEOPLE OF THE STATE OF CALIFORNIA ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. THE UNITED STATES OF AMERICA ex rel. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, Defendants.	Civil No. S-74-66 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The motions of plaintiff and of defendants, each for summary judgment, came on regularly to be heard on September 3, 1974 before the Honorable Philip C. Wilkins, United States District Judge. O. J. Solander, Esq., appeared as counsel for plaintiff. Richard W. Nichols, Assistant U.S. Attorney, appeared as counsel for defendants. The cross-motions having been fully briefed, and the Court being fully apprised in the premises, and the matter having been submitted, and good

cause appearing therefor,

The Court now finds that defendants are not constitutionally or statutorily prohibited from promulgating and giving effect to Policy and Procedure Memorandum 80-4, paragraph 31, which limits payments for interest under the Federal Aid Highway Act to a period of thirty days after the date payment is made available to property owners by deposit in courts of competent jurisdiction. The Court further finds that defendants are not required to participate in interest payments made by plaintiff on condemnation deposits for federally aided highways in California where said deposits are retained by the State Treasurer of California for a period in excess of thirty days while the State condemnation proceeding is pending therein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment be, and the same is hereby, denied;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment be, and the same is hereby, granted;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by reason of its complaint herein, and that judgment be summarily entered in favor of defendants.

DATED: September 4, 1974.

PHILIP C. WILKINS
UNITED STATES DISTRICT JUDGE

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA EX REL: DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellant, vs. THE UNITED STATES OF AMERICA, EX REL: DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, Defendant/Appellee.	NO. 75-1140

Appeal from the United States District Court

For the Eastern District of California

Before: BROWNING and CHOY, Circuit Judges,

and GRAY,* District Judge.

PER CURIAM.

This is an appeal from a district court order granting Appellee's motion for summary judgment. We affirm.

Pursuant to the provisions of the Federal-Aid Highways Act (23 U.S.C. § 101, et seq.), the United States and the State of California undertook mutual responsibility for the construction and financing of Interstate Highway 5 in San Diego County, California. The statute obligates the United States to pay 90 percent "of the total cost thereof"

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* The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

(23 U.S.C. § 120(c)), and it is clear that cost of construction includes the cost of right-of-way acquisition (23 U.S.C. § 101(a)).

The question before us is whether these statutory provisions are in conflict with, and thus must be held to nullify, a regulation by the Secretary of Commerce which provides, in effect, that federal funds will not be used to pay interest on any portion of a condemnation award or settlement for more than thirty days after such money is deposited with the court. Policy and Procedure Memorandum 80-4, ¶ 31.

In the present instance, and pursuant to California law, the State paid interest on the amount of the fund deposited until such fund was actually accepted by the land owner, 414 days after it had become available to him, and the Federal Government, pursuant to the regulation, reimbursed the State only for the first thirty days.

The State, as plaintiff in this action, takes the position that "total cost" (as used in § 120(c)) has a plain meaning and that inasmuch as interest on the purchase price of an acquired right-of-way is part of the total cost thereof, the Federal Government is obliged to ignore the regulation of the Secretary as being contrary to the statute and absorb 90 percent of the interest so paid. The trial court disagreed, and so do we.

The interpretation sought by the State would prevent the Secretary from making any evaluation as to the reasonableness of the costs of construction or from promul-

gating regulations reasonably designed to limit such costs. Certainly, Congress must have intended that the statutory obligation to pay 90 percent of the total cost must include some corresponding right to impose reasonable limitations upon such costs, rather than to leave the federal treasury at the mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly.

We think that such expression of congressional intent is contained in 23 U.S.C. § 315, which gives to the Secretary (now the Secretary of Transportation) the authority ". . . to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title [Highways]." We believe that the challenged regulation is reasonably adapted to the administration of the Act and in harmony with the statutory provisions thereof upon which the State relies.

An additional basis for our conclusion that the subject regulation is in accord with the Act is contained in § 108(a). That provision expresses the purpose of ". . . facilitating the acquisition of rights-of-way . . . in the most expeditious and economical manner . . .," and in order to carry out such purpose it authorizes the expenditure of funds ". . . for acquisition of rights-of-way . . . in anticipation of construction and under such rules and regulations as the Secretary may prescribe." The Secretary might well conclude that rights-of-way could be acquired more economically and expeditiously if the land owners were encouraged

to draw down the deposited funds as soon as they were available, and the regulation limiting the interest payment to thirty days is reasonably designed to provide such encouragement.

The judgment of the district court is affirmed.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA EX REL: DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellant, vs. THE UNITED STATES OF AMERICA, EX REL: DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, Defendant/Appellee.	NO. 75-1140 SUPERSEDING OPINION

Appeal from the United States District Court

For the Eastern District of California

Before: BROWNING and CHOY, Circuit Judges,

and GRAY,* District Judge

The per curiam opinion filed September 30, 1976, is withdrawn and the following substituted therefor:

This is an appeal from a district court order granting Appellee's motion for summary judgment. We affirm.

Pursuant to the provisions of the Federal-Aid Highways Act (23 U.S.C. § 101, et seq.), the United States and the State of California undertook mutual responsibility for the construction and financing of Interstate Highway 5

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* The Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

in San Diego County, California. The statute obligates the United States to pay 90 percent "of the total cost thereof" (23 U.S.C. § 120(c)), and it is clear that cost of construction includes the cost of right-of-way acquisition (23 U.S.C. § 101(a)).

The question before us is whether these statutory provisions are in conflict with, and thus must be held to nullify, a directive of the Federal Highway Administration which provides, in effect, that federal funds will not be used to pay interest on any portion of a condemnation award or settlement for more than thirty days after such money is deposited with the court. Policy and Procedure Memorandum 80-4, ¶ 31.[1/]

In the present instance, and pursuant to California law, the State paid interest on the amount of the fund deposited until such fund was actually accepted by the land owner, 414 days after it had become available to him, and the Federal Government, pursuant to Policy And Procedure Memorandum 80-4, ¶ 31, reimbursed the State only for the first thirty days.

The Government contends that the Policy and Procedure Memorandum under which the challenged action was taken was given legislative sanction by 23 U.S.C. § 315, which specifically authorizes the Secretary "to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title [Highways]."

It is not clear whether or not the Policy and

Procedure Memorandum (PPM's) rise to the status of regulations, and we are not certain as to the full legal effect to which they are entitled.[2/] Regulations of the Department of Transportation provide that the Federal Highway Administrator "shall promulgate and require the observance of policies and procedures . . . for carrying out the provisions and purposes of Federal laws, the policies of the Federal Highway Administration, and the regulations of this part." 23 C.F.R. 1.32(a). Although neither the record in this case nor the Government's brief reveals the precise authority for the PPM's, we infer them to be based upon this regulation.

In its petition for rehearing, the State makes a big point of its contention that PPM 80-4 31 is not a regulation. However, in its original brief, it took the position that it is not material whether the challenged administrative provision is a regulation or an "interpretive rule," because it is "contradictory of the plain meaning of an unambiguous statute, is an attempt at legislation and has no legal effect." (See, Appellant's opening brief, page 10). The State's position is that "total cost" (as used in § 120(c)) has a plain meaning and that inasmuch as interest on the purchase price of an acquired right-of-way is part of the total cost thereof, the Federal Government is obliged to ignore the above-mentioned directive as being contrary to the statute and absorb 90 percent of the interest so paid. The trial court disagreed, and so do we.

The interpretation sought by the State would

present the Secretary (now the Secretary of Transportation) from making any evaluation as to the reasonableness of the costs of construction or from promulgating regulations reasonably designed to limit such costs. Certainly, Congress must have intended that the statutory obligation to pay 90 percent of the total cost must include some corresponding right to impose reasonable limitations upon such costs, rather than to leave the Federal Treasury at the mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly. We believe that the challenged PPM, whether it be designated a regulation or an interpretive rule, is reasonably adpated to the administration of the Act and in harmony with the statutory provisions thereof upon which the State relies.

An additional basis for our conclusion that the subject memorandum is in accord with the Act is contained in § 108(a). That provision expresses the purpose of "facilitating the acquisition of rights-of-way . . . in the most expeditious and economical manner" and in order to carry out such purpose it authorizes the expenditure of funds "for acquisition of rights-of-way . . . in anticipation of construction and under such rules and regulations as the Secretary may prescribe." The Department of Transportation might well conclude that rights-of-way could be acquired more economically and expeditiously if the land owners were encouraged to draw down the deposited funds as soon as they were available, and the administrative policy limiting

the interest payment to thirty days is reasonably designed to provide such encouragement.

When confronted with a problem similar to ours, in the context of giving effect to the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures, the Supreme Court said:

> [They] are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." Griggs v. Duke Power Co., 401 U.S., at 433-434. See also Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973).

Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Having found that the PPM at issue in the present case is consistent with the purposes and policies of the Federal-Aid Highway Act, we defer to the interpretation adopted by the Department.

The judgment of the district court is affirmed.

Footnotes

1. [reference on page 2]

The Federal-Aid Highway Act was originally administered by the Department of Commerce. When the Department of Transportation was created in 1966, the functions, powers, and duties of the Secretary of Commerce under the Act were transferred to the Secretary of Transportation. 49 U.S.C. § 1655(a)(1).

2. [reference on page 3]

In Lathan v. Brinegar, 506 F.2d 677, 682 n.6 (9th Cir. 1974), this court noted the Department of Transportation's own ruling that the Federal Highway Administration's memoranda did not rise to the status of regulations, quoting from 23 C.F.R. 1.32(a) (1973): "No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." This language, however, has been deleted in the 1976 revision of 23 C.F.R. 1.32(a). Because it is not apparent what effect the Department of Transportation intended this deletion to have, the issue is clouded even further.

APPENDIX D

APPENDIX D

TITLE 23

§ 101. Definitions and declaration of policy

(a) As used in this title, unless the context requires otherwise—

The term "apportionment" in accordance with section 104 of this title includes unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration in the Department of Commerce), acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, acquisition and rehabilitation, relocation, and construction of replacement housing, and improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas.

§ 106. Plans, specifications, and estimates

(a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable

after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

§ 108. Advance acquisition of rights-of-way

(a) For the purpose of facilitating the acquisition of rights-of-way on any of the Federal-aid highway systems, including the Interstate System, in the most expeditious and economical manner, and recognizing that the acquisition of rights-of-way requires lengthy planning and negotiations if it is to be done at a reasonable cost, the Secretary, upon the request of the State highway department, is authorized to make available the funds apportioned to any State for expenditure on any of the Federal-aid highway systems, including the Interstate System, for acquisition of rights-of-way, in anticipation of construction and under such rules and regulations as the Secretary may prescribe. The agreement between the Secretary and the State highway department for the reimbursement of the cost of such rights-of-way shall provide for the actual construction of a road on such rights-of-way within a period not exceeding ten years following the fiscal year in which such request is made.

§ 120 Federal share payable

(c) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project on the Interstate System provided for by funds made available under the provisions of section 108 (b) of the Federal-Aid Highway Act of 1956 [70 Stat. 378, 23 USC

158] shall be increased to 90 per centum of the total cost thereof, plus a percentage of the remaining 10 per centum of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein, equal to the percentage that the area of such lands in such State is of its total area, except that such Federal share payable on any project in any State shall not exceed 95 per centum of the total cost of such project.

§ 315. Rules, regulations, and recommendations

Except as provided in sections 204 (d), 205 (a), 206 (b), 207 (b), and 208 (c) of this title, the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State highway departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

APPENDIX E

APPENDIX E

Code of Civil Procedure of the State of California

§ 1255b. Compensation and damages; interest

(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(1) The date of the entry of judgment.

(2) The date that the possession of the property sought to be condemned is taken or the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession.

(b) If after the date that interest begins to accrue the defendant continues in actual possession of or receives rents, issues and profits from the property, the value of such possession and of such rents, issues and profits shall be offset against the interest that accrues during the period the defendant continues in actual possession or receives such rents, issues or profits.

(c) The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates:

(1) As to any amount deposited pursuant to Section 1243.5, the date that such amount is withdrawn by the person entitled thereto.

(2) As to any amount paid into court pursuant to Section 1254, the date of such payment.

(3) As to any amount paid to the person entitled thereto, the date of such payment.

(4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with

the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment. (Added Stats. 1959, c. 282, p. 2189, § 1. As amended Stats. 1961, c. 1613, p. 3450, § 10.)

APPENDIX F

APPENDIX F

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRIATION
BUREAU OF PUBLIC ROADS

POLICY AND PROCEDURE MEMORANDUM 80-1
(March 20, 1969)

1. PURPOSE

To prescribe the Bureau policies and procedures relating to right-of-way acquisition, occupancy, use and disposition.

2. EFFECTIVE DATE AND APPLICABILITY

a. The effective date of the 80 Series PPM's is July 1, 1967, except as otherwise provided. Previous memorandums shall govern all actions taken prior to July 1, 1967.

b. The provisions of the 80 Series PPM's are not applicable to secondary road plan projects, except to the extent made applicable by the secondary road plans submitted by the States and accepted by the Director and as required by paragraph 3a of PPM 80-5.

3. REIMBURSEMENT BASIS

a. Under Federal law and regulations, participation of Federal funds is permitted in right-of-way and property damage costs incurred by the States for highway projects financed in whole or in part with Federal funds under the circumstances and to the extent set forth below:

* * * * *

(2) When such costs are incurred pursuant to and in conformity with State law, except as provided in paragraphs 5i, 5j and 5n of this memorandum.

5. GENERAL PROVISIONS

* * * * *

i. Any expenditure of a type normal to the operation of the State highway department and incident to the acquisition of rights-of-way, either by negotiation or condemnation, such as those made for surveys, plats, appraisals, appraisal review, abstracts of title, title certificates, title insurance, closing and escrow services, court costs and disbursements, witness fees, recording fees, advertising, economic studies, salaries, fees and travel expenses of field representatives of the State, county, or city while engaged in right-of-way acquisition work, and of attorneys engaged in the preparation or trial of condemnation cases are eligible for Federal participation if reasonable, properly supported and shown as incidental expenses on the certificate submitted with the voucher and chargeable to highway funds. The administrative and headquarters expenses of the right-of-way offices or of field offices are not eligible for Federal participation. When right-of-way is made available without cost to the State, or where the State elects not to request Federal participation in the cost of a parcel, the above-mentioned incidental expenses if actually incurred will be eligible for Federal participation to the same extent they would have been had a claim been made for the right-of-way acquired. Federal funds will participate in accordance with the above in the usual costs and disbursements chargeable to a condemning authority under State law as part of a valid cost bill approved by a court in a condemnation proceeding. However, Federal participation will not be permitted in the cost of landowners'

(1) Attorney fees

(2) Appraiser fees

(3) Expert witness fees, or

(4) Similar costs to a landowner based on value of the services rendered to him which are paid by the State in connection with acquisition of rights-of-way, regardless of whether such costs are included in court judgments or court costs in litigated condemnation cases.

j. Federal participation will not be permitted in the payment of taxes, or special assessments. However the State may pay taxes or assessments for the property owner in disbursing the consideration to be paid the property owner for the right-of-way acquired. Where property has been acquired in advance of construction and the State highway department is required to pay taxes or make payments in lieu of taxes thereon, such payments may be considered as a legitimate property management expense and be deducted from gross rentals received. Whenever the cost of such payments and other property management expenses on a project are approaching the gross rentals the division engineer and State should consider whether the rental phase of the project should be closed out or continued as a necessary public service to relieve problems of displacement or facilitate an orderly plan for advancing construction phases.

* * * * *

n. Payments made for personal property, loss of business or good will, circuity of travel and diversion of traffic, or other items of damage not generally compensable in eminent domain, are not considered eligible for Federal participation. Federal funds will participate in payments made for loss or impairment of access if such payments are based upon elements of damage generally compensable in eminent domain.

POLICY AND PROCEDURE MEMORANDUM 80-4
(April 17, 1967)

3. PARTIAL PAYMENT TO OWNERS

1. Federal funds will not participate in any interest payments on the portion of the final settlement or award represented by such partial payment, after the date payment is made available to the property owner with the following exception. Federal participation may be allowed in interest payments for a period of not to exceed 30 days where due to court procedures the deposit cannot be made available to the property owner immediately upon condemnation. Under such circumstances physical possession must not be taken until the deposit is available to the property owner.